KEKER & VAN NEST LLP
ROBERT A. VAN NEST - # 84065
rvannest@kvn.com
CHRISTA M. ANDERSON - # 184325
canderson@kvn.com
DANIEL PURCELL - # 191424
dpurcell@kvn.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

KING & SPALDING LLP
DONALD F. ZIMMER, JR. - #112279
fzimmer@kslaw.com
CHERYL A. SABNIS - #224323
csabnis@kslaw.com
101 Second Street, Suite 2300
San Francisco, CA 94105
Tel: 415.318.1200
Fax: 415.318.1300

KING & SPALDING LLP
SCOTT T. WEINGAERTNER
(*Pro Hac Vice*)
sweingaertner@kslaw.com
ROBERT F. PERRY
rperry@kslaw.com
BRUCE W. BABER (Pro Hac Vice)
1185 Avenue of the Americas
New York, NY 10036
Tel: 212.556.2100
Fax: 212.556.2222

GREENBERG TRAURIG, LLP
IAN C. BALLON - #141819
ballon@gtlaw.com
HEATHER MEEKER - #172148
meekerh@gtlaw.com
1900 University Avenue
East Palo Alto, CA 94303
Tel: 650.328.8500
Fax: 650.328.8508

Attorneys for Defendant
GOOGLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No. 3:10-cv-03651 WHA

GOOGLE INC.'S OPPOSITION TO ORACLE AMERICA, INC.'S MOTION FOR ADMINISTRATIVE RELIEF REGARDING STATEMENT TO JURY

Dept.: Courtroom 8, 19th Floor
Judge: Hon. William Alsup

The Court should reject Oracle's "motion for administrative relief," which is actually just an improper motion for reconsideration of the Court's order deeming admitted the fact that the names of the Java API packages at issue in this case are not protected by copyright, as the Court found last year in its summary-judgment ruling. Oracle contends that it would be misleading to tell the jury that the names are not copyrightable without also telling them that, in some circumstances, the structure, selection, and arrangement of those names ***might*** be copyrightable. But this is exactly the argument that Oracle made last week, in its opposition to Google's motion to deem admitted the non-copyrightability of the names. Oracle Opp'n to Google Admin. Mot. [Dkt. 882] at 3-4. There, Oracle argued that "to simply instruct the jury that 'the names are not protected by copyright'" would "risk[ ] being misinterpreted to apply to the selection and arrangement of the names." *Id.* Oracle's present motion is devoted solely to rearguing this point. That alone is reason enough to deny it.

Moreover, Oracle's requested "clarification" is a general statement of copyright law that can, and should, wait for jury instructions. Telling the jury at the outset that the structure, selection, and arrangement of the API package names ***might*** be copyrightable is a vague statement of the law whose relevance is contingent on facts the Court and the jury have not yet heard. It would not be helpful. It is not a definitive finding, like the Court's ruling that the names themselves are not copyrightable. There are many statements related to the copyrightability of the structure, selection, and arrangement of the APIs that ***might*** be true, depending on how the record develops at trial:

- "A copyright, we have seen, bars use of the particular 'expression' of an idea in a copyrighted work but does not bar use of the 'idea' itself." *Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971). "[I]deas themselves are not protected by copyright and cannot therefore be infringed." *Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1507 (9th Cir. 1987).

- Where an idea and the expression merge, and "are thus inseparable, copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea.'" *Rosenthal Jewelry*, 446 F.2d at 742.

- Any elements of the APIs that are "functional requirements for compatibility" are not protected by copyright. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1522 (9th Cir. 1992).

- "Under the *scenes a faire* doctrine, protection is denied to those elements of a program that have been dictated by external factors." *Baystate Techs. v. Bentley Sys.*, 946 F. Supp. 1079, 1088 (D. Mass. 1996).

- Even if the structure, selection, and arrangement of the APIs are copyrightable under all of the above legal principles, any use of that structure by Google could be a fair use and therefore not an infringement.

Simply flagging complex legal issues like these for the jury at the start of trial would raise myriad questions and answer none of them. That is what careful and focused jury instructions are for—and the sensible time to issue such instructions is at the close of evidence, when any instructions can and should be tailored to reflect the evidence actually offered at trial, as well as the Court's conclusions of law on copyrightability. The Court invited the parties to move to deem undisputed narrow, identifiable issues that had been conclusively resolved, like the copyrightability of names. The Court did not invite the parties to suggest general statements of copyright law.

The Court should deny Oracle's motion for reconsideration.

Dated: April 13, 2012

KEKER & VAN NEST LLP

/s/ Robert A. Van Nest

By: ROBERT A. VAN NEST

Attorneys for Defendant
GOOGLE INC.